

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:03-cr-00077-JSM-TBM-ALL

SAMI AMIN AL-ARIAN, ET. AL

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MOTION OF MEDIA GENERAL OPERATIONS  
FOR LEAVE TO INTERVENE AND  
ACCESS TO COMPLETED JUROR QUESTIONNAIRES

Media General Operations, Inc. d/b/a *The Tampa Tribune* (hereinafter “the Tribune”), hereby files this Motion to Intervene for the limited purpose of seeking access to the completed juror questionnaires received by the Court in this matter. The Tribune seeks leave to intervene in these proceedings to review the responses to the written questionnaires furnished by prospective jurors in anticipation of jury selection in this case. Grounds for this motion are set forth in the following memorandum.

MEMORANDUM OF LAW

A. Background.

In February 2003, former University of South Florida professor Sami Amin Al-Arian, former University of South Florida instructor Sameeh Hammoudeh, Illinois resident Ghassan Zayed Ballut, and Hernando County resident Hatim Naji Fariz were charged in a fifty count indictment on numerous federal charges, including racketeering and conspiracy to commit murder. The indictment accuses these Defendants and others of supporting, promoting and fundraising for

Palestinian Islamic Jihad, which the United States government previously has declared a terrorist group. A Superceding Indictment was filed on September 21, 2004. The charges against the Defendants, which detail an alleged worldwide conspiracy dating back as early as 1988, are matters of intense local and national public interest.

Trial of four of the named Defendants is scheduled to commence on May 16, 2005. In November 2004, the Court granted the Government's request for an innominate jury. (doc. 728). On or about April 5, 2005, a reporter for the Tribune requested access to the juror questionnaires completed by the prospective jury venire in this matter. Although that oral request was denied, the Tribune was furnished a copy of the blank questionnaire. This document reflects that the prospective jurors were asked a multitude of questions touching upon areas including the jurors' general educational and employment background, their own experiences, if any, that may affect their impartiality, as well as their general attitudes towards issues such as ethnicity, the war in Iraq, and the events of September 11, 2001. The responses provided by these prospective jurors will provide a contemporary insight into the views of the public in one of the earliest terrorism prosecutions after the 2001 World Trade Center attacks. These documents will offer a critical snap-shot of the attitudes, beliefs, and potential biases of a cross-section of the public, particularly those who may be called upon to sit in judgment of these defendants and others charged with terrorism offenses.

B. Jury Plan

Title 28, United Code, Section 1867 provides in relevant part:

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than \$1,000 or imprisoned not more than one year, or both.

28 U.S.C. §1867(f). *Accord In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4<sup>th</sup> Cir. 1988)

(information on venire list compiled from jury questionnaires was protected from disclosure by Section 1867(f)).

The Middle District of Florida's "Plan for the Qualification and Selection of Grand and Petit Jurors," approved on May 6, 2004, provides in Chapter 11 that "the contents of records and papers used by the Clerk in connection with the juror qualification and selection process shall not be disclosed, except upon written order of the District Court." See Section 11.02(a). Unfortunately, Section 11.02(a) offers no criteria guiding the Court's determination of when to issue a written order granting the release of the jury questionnaires or similar information. The Tribune would respectfully submit that the Court should apply a balancing standard similar to that applicable to the public's common law right of access to judicial records.

C. Standing.

As a member of the news media, the Tribune — a daily newspaper — has standing to intervene for the limited purpose of seeking access to judicial proceedings and records. *See, e.g., United States v. Ellis*, 90 F.3d 447, 449 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 964 (1997); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1561 (11th Cir. 1989) (intervening members of news media had standing to appeal scope of closure order); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983).

D. Judicial Records.

The public enjoys a common law right to inspect and copy judicial records. The existence of such a right was recognized by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), in which the Court stated that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597. The decision regarding access is within the court's discretion, which must be exercised in light of the facts and circumstances of the particular case. *Id.* at 598. Notwithstanding this discretion, a presumption of openness attaches to judicial records, and this presumption in favor of public access must be balanced against any competing interest advanced. *Id.* at 602. *Accord Newman v. Graddick*, 696 F.2d 796, 803 (11<sup>th</sup> Cir. 1983).

This right of access to judicial records generally has been justified by the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records.

*See, e.g., United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981). "This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system." *Newman*, 696 F.2d at 803. While the common law right is not constitutional in dimension, it "supports and furthers many of the same interests which underlie those freedoms protected by the Constitution." *United States v. Edwards*, 672 F.2d 1289, 1293 (7<sup>th</sup> Cir. 1981). Public scrutiny of judicial proceedings furthers the laudable goals of promoting community respect for the rule of law, providing a check on the activities of judges and litigants and fostering more accurate fact-finding. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7<sup>th</sup> Cir. 1994).

The Tribune acknowledges that the right to inspect judicial records is not absolute and that the Court must balance this right against other competing interests, such as the accused's right to a fair trial and the rights of privacy of the prospective jurors. *See, e.g., Newman*, 696 F.2d at 796 (Sixth Amendment; *United States v. King*, 140 F.3d 76, 83 (2d Cir. 1998) (denying access to transcripts of closed voir dire of jurors due to privacy concerns).

In addition, generally, courts look to factors such as "whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, whether access is likely to promote public understanding of historically significant events, and whether the press has already been permitted substantial access to the contents of the records." *Newman v. Graddick*, 696 F.2d

796 (11<sup>th</sup> Cir. 1983). Moreover, courts should deny access only on the basis of articulable facts, as opposed to unsupported hypothesis or conjecture. *See, e.g., Grove Fresh Distributors, Inc.*, 24 F.3d at 897.

The Tribune seeks access to the questionnaires that were completed by the prospective jurors in this very significant case. Many of these jury questionnaires have been relied upon by the Court in granting or denying requests by the parties to strike prospective jurors from the panel. Only a few cases have addressed, directly or indirectly, the issue of public access to information contained within completed jury questionnaires. To the extent that a general judicial trend can be articulated from the relatively small number of relevant cases, it may be characterized as the balancing of the protection of juror privacy and the accused's right to fair trial against the public's need to understand and monitor the administration of the criminal justice system in high profile cases.

For example, in *United States v. George*, 1992 W.L. 233354 (D.D.C. 1992) (memorandum opinion), the defendant was the Deputy Director of Operations for the Central Intelligence Agency and was one of the highest ranking officials to be brought to trial in the Iran-Contra affair. Despite the intense publicity surrounding this high profile criminal trial, the court released the completed jury questionnaires in a high profile matter two days after jury selection subject to redaction for "intensely personal information that would be inappropriate for public disclosure."

The time has come, in light of the present application, to release completed copies of the jury questionnaire that were completed by the 51 individuals who appeared for individual voir dire. These questionnaires, however, shall not be released in their entirety. The court shall redact those portions of

prospective jurors' answers which contain deeply personal and private information that the prospective jurors would wish to keep out of the public domain.

*Id.* Importantly, like the present case, the *George* case involved a trial of great public interest. Unlike the present case, however, there is no indication that the *George* court ordered an anonymous jury. Therefore, the privacy concerns in the *George* case were significantly greater because the personal information released would be readily associated with an identifiable juror. In this case, the Court already has implemented careful procedures to maintain the anonymity of the prospective jurors, by not including identifying information in the questionnaire and by cautioning the jurors in the questionnaire not to identify their employers. To the extent that the questionnaires contain deeply personal information, their release will not implicate privacy concerns because there is no way to attribute the information to any particular potential juror, particularly since the Tribune seeks the release of all of the completed questionnaires, and not merely those of the jurors who are impaneled or appear for individual voir dire.

In this case, the jurors' privacy interests are not threatened by disclosure of the completed jury questionnaires. The Court previously granted the Government's Motion for an innominate jury. Moreover, the jury questionnaires carefully guide and direct the jurors to refrain from disclosing potentially identifying information, such as the name of their employer. The questionnaires do not ask for the jurors' names or addresses, nor do they ask the jurors to identify any of their family or friends. Given the very large number of questionnaires, there is virtually no chance that any specific answers can be matched up to any particular jurors.

Moreover, much of this information has been disclosed publicly, at least in part. On March 3 and 4, 2005, hearings were held in open court at which the Court entertained requests by the parties to strike numerous jurors for cause. During these hearings, excerpts of the completed questionnaires were displayed briefly on an overhead monitor contemporaneously with their discussion by counsel and the court. Although the information was not disclosed in a manner that allowed for easy review by members of the press and public in attendance at the hearing, the information was, nonetheless, discussed and disclosed in open court. In *United States v. King*, 911 F. Supp. 113 (S.D.N.Y. 1998), the trial court grappled with issues of publicity in the criminal trial of Don King, the famous and controversial boxing promoter. As one of the media guidelines adopted by the court, it concluded that the completed jury questionnaires would be available to the public after the impaneling of the trial jury. This order was affirmed by the Second Circuit. See *United States v. King*, 140 F.3d 76 (2d Cir. 1998).

To the extent that the parties argue that the jury may be affected by the public dissemination of this material, the Tribune respectfully would point out that the more controversial of the answers, i.e., those that were likely to shed light on potential juror bias, already have been discussed in open court. The Tribune would submit that such speculative problems can be addressed through strict instructions and close monitoring of the jury. See, e.g., *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (judge is entitled to rely on the jury's observation of admonition to avoid exposure to media reports of the trial). This Court should



accord significant weight to the impact of "skillfully conducted *voir dire* examination as an antidote for the effects of publicity." *Martin*, 746 F.2d at 970. As the Third Circuit has observed:

Since the inception of our criminal justice system, courts have acknowledged the utility of skillfully conducted *voir dire* as a means of ascertaining a prospective juror's impartiality . . . . This "testing" by *voir dire* remains a preferred and effective means of determining a juror's impartiality and assuring the accused of a fair trial.

*Id.* at 973. Given the nature of the publicity that has been afforded already to the Defendants and charges in this case, the Court undoubtedly will be asked to employ protective measures to ensure an impartial jury, irrespective of the release of these records. Those measures also will assist in insulating the Defendants from any suggested adverse impact of the release of these records. Moreover, the Tribune would respectfully request that, if this Court is inclined to withhold the completed jury questionnaires, that the questionnaires be released once the jury is impaneled, as in the notorious King in George criminal trials.

### CONCLUSION

The responses to these questionnaires will paint an important picture of the current mindset of the public towards defendants charged with terrorism offenses. This is one of the earliest cases prosecuting terrorism-related offenses. The public perception of these defendants, indeed of entire ethnicities and religions, reflected in these responses, is of immense public importance in these turbulent and controversial times. Because these responses originate from a cross-section of the community, they arguably will be fairly representative of the attitudes and biases of

people in the Tampa Bay area. The information contained in these responses will offer the public an early insight into, and understanding of, the dynamics created by this noteworthy criminal prosecution, and ultimately the effectiveness of the federal criminal justice system in adjudicating cases involving allegations of terrorism-related activity. The great public importance of this information is indisputable.

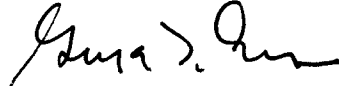
Given the steps already take by this Court to protect the privacy interests of the prospective jurors, as well as the previous discussion and dissemination of selected portions of many of the jury questionnaires in open court, no compelling reason exists to withhold this information from public view. The Tribune respectfully requests that the Court release to the public the completed anonymous jury questionnaires. If the Court is not willing to release the jury questionnaires at this time, the Tribune would request that the jury questionnaires be released once a jury is impaneled in this case.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(d), the Tribune respectfully requests oral argument on this motion and estimates that the argument will take thirty (30) minutes.

Respectfully submitted,

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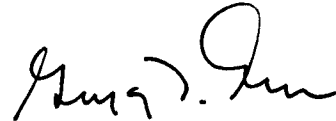
Attorneys for Intervenor

Media General Operations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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Kevin T. Beck  
Stephen N. Bernstein  
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